

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 34 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed
to see the judgements?No

2. To be referred to the Reporter or not?
No

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3. Whether Their Lordships wish to see the fair copy
of the judgement? NNo

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?

No

5. Whether it is to be circulated to the Civil Judge?

No

HMP ENGINEERS LTD.

Versus

STATE OF GUJARAT

Appearance:

MR BR GUPTA for Petitioners

Mr. A.P. Rawal, APP, for Respondent No. 1

MR JD AJMERA for Respondent No. 3

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 04/03/98

ORAL JUDGEMENT

The petitioners have filed this application under Section 482 of the Code of Criminal Procedure ('Code' for short), to quash complaint, which is lodged by respondent No.3, Provident Fund Inspector, at Pandesara Industrial Estate Police Station, Surat, for the offences punishable under Sections 405 and 406 of the Indian Penal Code, for not paying the amount of provident fund dues.

The brief facts are as under:

Petitioner No.1, H.M.P. Engineers Limited, is a public limited company, having its registered office in Calcutta. Petitioners Nos. 2 to 6 are Directors of the said Company. Petitioner No.7 is Factory Manager of the manufacturing unit of the said Company situated at Fatehnagar, Udhna, District Surat. Because of the acute shortage of funds in the company, provident fund dues amounting to Rs.11,09,806/- for the period from June 1996 to March 1997 could not be paid by the company. The Sub-Regional Provident Fund Commissioner, Surat, sent notice on April 25, 1997 under Section 7A of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 ('Act' for short), asking the Company to provide various records on May 16, 1997 for determination of amount due from the said unit under the Act. The said notice was received by the company on May 12, 1997. The Company addressed a letter to the Sub-Regional Provident Fund Commissioner, Surat, to postpone the date of hearing to June 16, 1997. However, no response or communication from the concerned authority was received by the company. The petitioners came to know that on May 26, 1997, the Provident Fund Inspector, attached to the Provident Fund Office, at Surat, lodged complaint against the petitioners, at Pandesara Industrial Estate Police Station, for the offences punishable under Section 406 of the Indian Penal Code.

On coming to know of filing of the complaint, the petitioners filed Special Civil Application No.4083 of 1997 in this High Court, inter alia, contending that the provisions of Sections 7B to 7Q of the Act were not complied with, and that the provisions of Sections 8, 8A to 8G of the Act were not followed. It is stated at the Bar that the said writ petition is pending in this High Court.

The petitioners have averred in the application that on June 3, 1997, they deposited an amount of Rs.2,12,054/- towards the arrears of provident fund dues, and further amount of Rs.2,14,551/- came to be paid on June 30, 1997, in pursuance of the order of the High Court dated June 11, 1997. It is further averred that, in all, the petitioners have paid an amount of Rs.11,09,806/- to the provident fund authorities, which is the subject matter of the complaint filed against the petitioners.

The learned advocate for the petitioners has strenuously urged that, without following the procedure prescribed under Sections 7 and 8 of the Act, and without determining the arrears of provident fund dues, the complaint was lodged by the Provident Fund Inspector before Pandesara Industrial Estate Police Station, Surat and, therefore, it requires to be quashed. The submission of the learned advocate for the petitioners is devoid of any merit. This Court, at the stage of hearing petition under Section 482 of the Code, is only required to see whether allegations in the first information report, prima facie, establish offence alleged against the petitioners. It is an admitted fact that the petitioners have failed to pay provident fund dues for the period from June 1996 to March 1997. They have paid the dues after lapse of considerable time and, therefore, it is clear that they had retained and dishonestly used the amount of provident fund contribution of the employees. In this connection, it would be worthwhile to refer to Explanation 1 of Section 405 of the Indian Penal Code, which reads as under:

"Explanation 1.- A person, being an employer, of an establishment whether exempted under Section 17 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1962) or not who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount for the contribution so deducted by him and if he makes default in the payment of such

contribution to the said fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid."

Reading Explanation 1 to Section 405, it is evident that the petitioners have, prima facie, committed offence of criminal breach of trust for which they are liable to be tried for the offence punishable under Section 406 of the Indian Penal Code.

The submission of the learned advocate for the petitioners that a stereotype cyclostyled complaint is lodged before the concerned police station, is devoid of any merit. In the complaint, the Provident Fund Inspector has specifically mentioned that the petitioners have not paid amount of Rs.11,09,806 towards provident fund dues for the period from June 1996 to March 1997. There is no prescribed form of complaint, which is to be lodged with the concerned police station. The purpose of filing first information report is to make the Investigating Agency aware about the commission of offence. The first information report (at Annexure "A") clearly shows that the petitioners have not paid provident fund dues and the petitioners, who are in-charge of the management of the company and who are responsible for the conduct of business of the company, are liable to be prosecuted for the alleged offence.

The submission of the learned advocate for the petitioners that, without following due procedure as prescribed under the act, the first information report is lodged, is also devoid of any merit. At the stage of quashing complaint, this Court is not required to look into defence of the petitioners, which may be led at the time of trial. Whether due procedure was followed by the Authority or not, requires investigation of facts, which can be gone into at the stage of trial.

The learned advocate for the petitioners has also argued that, in the complaint it is not averred that all the petitioners are in-charge of the company and are responsible for the conduct of affairs of the company, as prescribed under Section 14A of the Act. It must be stated that, in the complaint, it is specifically stated that the petitioners are responsible for the conduct and administration of the company and the names of the petitioners have been shown in the complaint as the persons who are in-charge of the management of the company. The learned advocate for the petitioners, in support of the submission that all the petitioners were not in-charge of the company and they are not liable to

be prosecuted for the alleged breach, has relied upon the decision of the Supreme Court, in the case of Delhi Municipality vs. Ram Kishan, reported in AIR 1982 Supreme Court 67. In the case of Ram Kishan (supra), in paragraph 15, the Supreme Court has made following observations:

"So far as the Manager is concerned, we are satisfied that from the very nature of his duties, it can be safely inferred that he would undoubtedly be vicariously liable for the offence; vicarious liability being an incident of an offence under the Act. So far as the Directors are concerned, there is not even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there is any act committed by the Directors from which a reasonable inference can be drawn that they could also be vicariously liable. In these circumstances, therefore, we find ourselves in complete agreement with the observation of the High Court that no case against the Directors (accused Nos. 4 to 7) has been made out ex-facie on the allegations made in the complaint and the proceedings against them were rightly quashed."

In the case before the Supreme Court, there was not a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there was any act committed by the Directors, from which a reasonable inference can be drawn that they could also be vicariously liable. In the present case, the complainant has clearly alleged in the complaint that the petitioners are in-charge of the management of the company and they are liable to be prosecuted for the alleged breach. However, it should be stated that whether the petitioners are in-charge of the management of the Company or not, is a disputed question of fact, which can be only decided at the time of trial and, therefore, the submission of the learned advocate for the petitioners that all the petitioners are not in-charge of the management of the Company, and they are not liable to be prosecuted for the alleged breach, is devoid of any merit.

In the facts and circumstances of the case, I am of the opinion that this is not a rarest of rare case where inference of this Court in exercise of its inherent powers under Section 482 of the Code is called for.

As a result of foregoing discussion, this application is rejected. Rule is discharged.

At this stage, the learned advocate for petitioners has requested to stay operation of this order so as to enable the petitioners to approach the higher forum.

In view of the fact that this Court has not granted any interim relief of staying investigation, at any stage, in favour of the petitioners, the request made by the learned advocate for the petitioner is rejected.

(swamy)